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POLITICAL REALITIES AND UNINTENDED CONSEQUENCES: WHY CAMPAIGN FINANCE REFORM IS TOO IMPORTANT TO BE LEFT TO THE LAWYERS

Kenneth R. Mayer *

I. INTRODUCTION

Professors Ackerman and Ayres deserve credit for making a provocative and original contribution to the campaign finance reform literature. As they correctly note, the history of campaign finance regulations follows a reform-adaptation-reform cycle that has become an infinite loop.¹ Every attempt to control or channel campaign funds, from the Tillman Act of 1907² to the Bipartisan Campaign Reform Act of 2002,³ produces the same result or is likely to do so. Candidates, parties, and interest groups change their behavior in ways that the law fails to anticipate and cannot keep up with; the regulatory dog is forever chasing, but never quite catching, its adaptive and evasive tail.⁴

By rejecting the disclosure-contribution limits paradigm of the 1970s, Ackerman and Ayres offer a campaign finance system that would consist of two main elements.⁵

PATRIOT DOLLARS—every registered voter would have a specified amount of money consisting of fifty dollars initially, divided among House, Senate, and presidential races,⁶ that could be donated to federal candidates, political parties, and interest groups

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1. BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 8 (2002).

2. Pub. L. No. 59-36, 34 Stat. 864 (1907).

3. Pub. L. No. 107-155, 116 Stat. 81 (to be codified in scattered sections of 2 U.S.C.).

4. See ACKERMAN & AYRES, *supra* note 1, at 8.

5. *Id.* at 9.

6. *Id.* at 76.

in each election cycle.⁷ The money could not be used for any other purpose, would lapse at the end of the cycle, and would be contributed anonymously.⁸

DONATION BOOTH—all private contributions must be made anonymously.⁹ Instead of going directly to candidates, contributions would be made to a blind trust, which then forwards them to candidates without reference to the contributor's identity or the amounts.¹⁰ Exceptions would be made for contributions under \$200, and those who gave more than \$200 would be identified only as giving \$200 or more.¹¹

The Patriot/donation booth system will, they argue, deliver us from this cycle, by providing a huge infusion of public funding into campaigns delivered via millions of distinct citizen acts, and by severing the informational links that allow officeholders to sell access and actions to private interests.¹² The turbocharged public funding system, Patriot, would allow candidates to wage campaigns without relying on wealthy donors, and would dilute the potency of large donations by creating a flood of small contributions—perhaps, the authors speculate, as much as \$5 billion.¹³ Patriot would expand the formal equality of the vote into the realm of political influence—providing every adult with just one vote no matter how rich or poor she is.¹⁴

The donation booth would alter the terms of the legislator-contributor relationship. Under the donation booth, contributors would still be able to claim that they had made a donation, but they would not be able to prove it.¹⁵ The concept includes two wrinkles to further reduce the credibility of these claims. First, donors can ask for a refund of their contributions within a specified cooling-off period, so that a canceled check would no longer suffice as proof.¹⁶ Second, large donations are broken up into random-sized chunks and distributed to candidates over time, so that

7. *Id.* at 70.

8. *Id.* at 17–18.

9. *Id.* at 26.

10. *Id.* at 95–96.

11. *Id.* at 96.

12. *Id.* at 8–9.

13. *See id.* at 7.

14. *See id.* at 14.

15. *Id.* at 6.

16. *Id.* at 101.

an especially large donation would not create a noticeable spike in what candidates receive.¹⁷ These provisions would create a "cheap talk" regime in which non-donors could act just like donors.¹⁸ Candidates and incumbents could not lavish official favors or sell access to wealthy donors, since they would never be sure who those donors really were.¹⁹ Donors would no longer be assured of favorable treatment because they could not prove to officials that they had really given.²⁰

What would politics look like under their proposal? They claim a number of direct and indirect consequences. Corporate plutocrats would see their political influence plummet, as they could no longer rely on huge contributions to pressure politicians.²¹ Policy decisions would be determined by the considered and disinterested judgment of legislators and citizens, rather than by who gave the most money.²² Pork barrel spending would decline, as legislators would no longer have an incentive to reward big donors with tax exemptions, subsidies, or the garden variety boondoggle.²³ Political participation of all forms would rise, because citizens would reengage with an electoral process that had left them behind, and because candidates would seek out previously ignored groups.²⁴ Inequalities in private wealth would no longer be transformed directly into inequalities in political influence.²⁵

It is in many ways an attractive notion, one that claims to achieve an egalitarian result through a "bottom up" system of individual empowerment rather than by coercive controls. At the same time, and at the risk of validating Longfellow's description of critics as "sentinels in the grand army of letters, stationed at the corners of newspapers and reviews, to challenge every new author,"²⁶ there are a number of serious problems with the Ackerman and Ayres proposal. My objections, once the academic

17. *Id.* at 104–05.

18. *Id.* at 6.

19. *See id.*

20. *See id.*

21. *See id.* at 171–72.

22. *See id.* at 177.

23. *Id.* at 172.

24. *See generally id.* at 173–77 (discussing the resulting increase in citizen participation).

25. *See generally id.* at 175–76.

26. HENRY WADSWORTH LONGFELLOW, *KAVANAGH: A TALE* 57 (Jean Downey ed., College & Univ. Press 1965) (1849).

jargon and high-powered theoretical language is stripped away, distill to two points.

One, it's a bad idea.

Two, it won't work and will probably do more harm than good.

It is a bad idea because it is based on a number of incorrect premises and faulty analogies. The *Voting with Dollars* system is based on the conceptually flawed axiom that the political process should—must—be purged of self-interested behavior. In doing so, it elevates one aspect of American political culture, equality, above all others and achieves it at the expense of other important values, especially free speech and individual autonomy. Although Ackerman and Ayres claim that their plan imposes only minor burdens on individual rights,²⁷ it actually creates remarkable restrictions on associational and speech rights. The analogy drawn between the secret ballot and the donation booth is flawed,²⁸ as it fails to recognize the difference between an individual right designed to protect against coercive state action, and a state-imposed prohibition.

Furthermore, it will not work. Some defects stem from forecasts about the likely consequences. In particular, Ackerman and Ayres have dramatically overestimated the number of people who will participate in the Patriot system. But this is splitting hairs. The deeper problems are twofold. First, the Patriot/donation booth system is inconsistent with the incentives that shape political activity, and as such is certain to suffer from the same adaptive and evasive forces that have gutted the 1970s reforms. Ackerman and Ayres assert that they have altered these incentives,²⁹ but they have not. Rather, they have only changed the methods and channels of political influence, and not always in positive ways. Second, the anonymity principle—the crucial aspect of the donation booth, and important to the Patriot system, too³⁰—will do little to interfere with credible communication between interest groups and politicians, will serve mainly to drive useful information out of the electoral process, and is almost certainly unconstitutional.

27. ACKERMAN & AYRES, *supra* note 1, at 7.

28. *Id.* at 6.

29. The structure of the donation booth, they claim, "deprives the two sides [politicians and contributors] of the incentive to hire lawyers to design new forms of evasive transaction." *Id.* at 46.

30. *See id.* at 26.

One sign that the authors haven't got it quite right is that their proposal, so simple and elegant at the start, becomes more and more convoluted as they try to deal with potential objections. One might call it perfection by algorithm. Structural problems, the potential for evasion, how to handle exploratory campaigns, and so forth, are dealt with by one complicated formula after another, to the point where the technical features of the proposal become more central than the philosophical premise.

My argument proceeds as follows. In Part II, I critique the empirical foundation of the proposal, which is the claim that money is the root of all evil in the political process. While there is little use in denying that money plays a key role in political decisions, I maintain that the link between money and outcomes is far more complex than the standard reformist argument will allow. What often *looks* like corrupt influence often turns out to be something far more benign. A recognition of this complexity requires a concomitant recognition of two resulting circumstances: first, that driving money out of the process will not necessarily lead to dramatic changes in policies or the distribution of political influence, and second, that the gains achieved by rearranging political influence come at a potential cost to other important values.

Part III critiques the voting booth/donation booth analogy. Ackerman and Ayres argue that there is nothing radical about tying the donation booth so closely to the secret ballot. They seek only to extend the rationale behind the voting booth to the broader arena of political influence, but they have both overstated the degree to which voting is actually secret and misread the nature and purpose of the secret ballot. Most surprisingly, they miss the crucial point that the secret ballot is almost universally considered an *individual right*, not an obligation imposed by the state. The donation booth, in contrast, is a mandatory system forced on individuals, whether they prefer anonymity or not. This fundamental difference undercuts the argument that *Voting with Dollars* represents a marginal change from existing practices.

Part IV addresses the practical consequences of the proposal. In order to work, the Patriot/donation booth system must meet three critical tests. First, enough people would have to participate in Patriot to direct sufficient public funds into the campaign system. Second, the "cheap talk" regime created by the donation booth would have to truly impede communication between contributors and office-holders. Third, the secrecy regime created by

the donation booth would have to be effective. None of these is likely. Participation is unlikely to come anywhere close to what the authors say they need. Interest groups and legislators will still find ways to communicate, especially since Ackerman and Ayres underestimate the role that reputation plays in ongoing political relationships. The secrecy required by the donation booth is almost certainly unconstitutional, and would require the government to create a new form of classified information requiring the same sort of protection as the Sensitive Compartmented Information ("SCI") that circulates in the national intelligence community.

On the whole, the Patriot/donation booth system curtails individual autonomy and free speech and will not achieve the goals that are presumed to make this tradeoff worthwhile.

II. CHALLENGING THE EMPIRICAL FOUNDATION: MONEY AND POLITICS

The primary justification for the Patriot/donation booth system is that political decisions are made in a marketplace, the currency of which is the campaign contribution.³¹ In the authors' view, political decisionmakers create policies not through a process of deliberation and public accountability, but on the basis of who gives the money.³² Money purchases official policy, official policies are made in order to generate future campaign contributions, and democratic deliberation is replaced by a legislative bazaar in which access and special interest legislation are openly bought and sold.³³ Because money is not distributed equally, the wealthy have disproportionate political influence and they use that influence to further enrich themselves.³⁴

It is easy enough to find evidence that this is so. Stories of how well-heeled industries or lobbyists have bought off Congress and the President at the expense of the public are a staple of the campaign reform literature: insurance industry contributions have stalled legislation to mandate parity in health insurance coverage

31. *See id.* at 171-72.

32. *See id.*

33. *See id.* at 172.

34. *See id.*

for mental illness; pharmaceutical industry contributions have prevented efforts to lower the costs of prescription drugs; trial lawyer contributions have blocked tort reform; contributions from the financial industry resulted in punitive bankruptcy legislation that puts credit card debts on the same plane as child support payments; corporate crooks at Enron, Tyco, Global Crossing, and WorldCom looted their companies into oblivion, making untold millions while using soft money to encourage legislators and regulators to look the other way and leaving workers with worthless stock and 401(k)s; and on, and on, and on.

But, as I and others have argued elsewhere, this is a decidedly simplistic view of the role that money plays in the political process.³⁵ In nearly every instance offered as an obvious example of how large campaign contributions have purchased legislation or official policy, closer examination reveals a far more complex set of motivations and effects. Indeed, the self-evident nature of the connection between money and policies often appears because the explanation itself is non-falsifiable. If one begins with the assumption that money drives outcomes, it is necessary only to choose an outcome and identify the groups that both benefited from the outcome and contributed money. From there, the conclusion that money determined the outcome follows inevitably.³⁶

The evidence that campaign contributions have a direct influence on legislator positions or official policy is, despite decades of research, surprisingly thin. Even the strongest findings of a direct relationship come with numerous qualifications and conditions that limit their generalizability.³⁷

35. See Kenneth R. Mayer, *Hey, Wait a Minute: The Assumptions Behind the Case for Campaign Finance Reform*, in *A USER'S GUIDE TO CAMPAIGN FINANCE REFORM* 75 (Gerald Lubenow ed., 2001).

36. One example is an award winning February 2000 article in *Time*, in which authors Donald Barlett and James Steele claimed that the recycling industry won an exemption from Superfund liabilities because of campaign contributions to key legislators. Donald L. Barlett & James B. Steele, *How the Little Guy Gets Crunched*, *TIME*, Feb. 7, 2000, at 38. What they left out of the story is that the opponents of the liability exemption included some of the largest corporations in the world—Waste Management, Westinghouse, General Electric, DuPont. See Mayer, *supra* note 35, at 73. These groups, as well as other powerful interests, including the National Association of Manufacturers and the American Insurance Association, unsuccessfully fought to defeat the exemption, and contributed approximately 200 times more than the recyclers. *Id.* at 73–74.

37. See, e.g., Stacy B. Gordon, *All Votes Are Not Created Equal: Campaign Contributions and Critical Votes*, 63 J. POL. 249 (2001). Gordon's study examines votes in one committee of the California Senate in the 1987–1988 session. *Id.* at 254. Gordon finds that

Despite the lack of strong direct evidence, critics are resistant to the idea that the connection is not there. After a short review of this mixed record, historian Paula Baker concludes that: "[i]t is nonetheless hard to put aside the assumption that large amounts of money must somehow have a loud voice."³⁸ The strongest arguments about monetary impacts are deductive: given what we think we know about individual behavior, it is difficult not to believe that money exerts a disproportionately large effect on policy, no matter what the evidence might show.

My point is not to deny that money plays an important role in contemporary politics. Rather, it is that the relationship between money and political power has more dimensions than the reform literature is willing to concede. If we accept that the role of money is complicated, it becomes somewhat harder to believe that driving it out of the political process—or redirecting the way in which it enters—would produce fundamental changes in the distribution of political influence, or different government policy.

United States v. Microsoft Corp.,³⁹ the antitrust case against the Microsoft Corporation ("Microsoft"), is particularly instructive in this regard, as it demonstrates the problems in arguing that neutral processes produce better outcomes than political ones, especially where money is involved. The case is a window through which we might see what politics would look like if money was driven out.

In October 1997, the United States Justice Department and nineteen states sued Microsoft, accusing the company of violating antitrust laws and breaking an earlier consent decree.⁴⁰ The main allegations were that Microsoft had engaged in anticompetitive practices by tying its web browser—Internet Explorer—to its Windows operating system, had acted illegally to maintain its op-

the effect of campaign contributions is strongest on those issues where a handful of votes are critical to the outcome. *Id.* at 260. The finding is provocative and may yet apply in other contexts. Still, the fact that the study refers to a single committee, in one election cycle, in one state suggests that caution is warranted, as even Gordon recognizes. *Id.* at 261.

38. Paula Baker, *Introduction: Does Money Buy Policy?*, in *MONEY AND POLITICS* 1, 2 (Paula Baker ed., 2002).

39. 980 F. Supp. 537 (D.D.C. 1997), *rev'd*, 147 F.3d 935 (D.C. Cir. 1998). Throughout this discussion, I refer to Microsoft as a unitary actor, even though this is not entirely accurate. The company is made up of thousands of individual employees, managers, and stockholders, and their interests will not always be perfectly aligned.

40. *Id.* at 538.

erating system monopoly, and had abused its operating system monopoly to crush competing application software—chiefly Netscape Navigator.⁴¹ In a series of rulings issued between November 1999 and June 2000, a federal judge found that the company was a monopoly, had violated antitrust laws, and should be broken up into two separate companies—one that would make the operating system and one that would produce application software.⁴² The breakup was overturned on appeal, although the United States Court of Appeals for the District of Columbia agreed that Microsoft had broken antitrust laws, and the trial judge was removed from further decisions on the remedy.⁴³ A new judge ordered a series of settlement talks, and in September 2001 the Justice Department changed its position on the lawsuit and announced that it would no longer seek a breakup of the company.⁴⁴ In November 2001, Microsoft and the Justice Department agreed on a consent decree outlining the steps that Microsoft would take to remedy the antitrust violations.⁴⁵ A federal judge approved the settlement in October 2002 and denied efforts by several state Attorneys General to impose more stringent restrictions.⁴⁶

The Justice Department's decision to abandon its efforts to break up Microsoft and to opt instead for a settlement is commonly explained as the result of the company's lobbying efforts and campaign contributions.⁴⁷ Before the mid-1990s, Microsoft, like most technology companies, had little presence in Washington, D.C., but its campaign finance and lobbying efforts grew

41. Rajiv Chandrasekaran & Elizabeth Corcoran, *U.S. Says Microsoft Violates Anti-trust Pact*, WASH. POST, Oct. 21, 1997, at A1.

42. *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000) (issuing the court's final judgment); *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (reporting the court's conclusions of law); *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (stating the court's findings of fact).

43. *United States v. Microsoft Corp.*, 253 F.3d 34, 46 (D.C. Cir. 2001).

44. Stephen Labaton, *U.S. Abandoning Its Effort To Break Apart Microsoft, Saying it Seeks Resolution*, N.Y. TIMES, Sept. 6, 2001, at A1.

45. See *United States v. Microsoft Corp.*, No. 98-1232, 2002 U.S. Dist. LEXIS 22864 (D.D.C. Nov. 12, 2002) (issuing the court's revised proposed final judgment). Not all of the states have agreed to drop their claims against Microsoft, and they have proceeded with separate litigation. See Ariana Eunjung Cha, *Microsoft to Pay Dividends for the First Time*, WASH. POST, Jan. 17, 2003, at E1.

46. *New York v. Microsoft Corp.*, No. 98-1233, 2002 U.S. Dist. LEXIS 21099 (D.D.C. Nov. 1, 2002) (mem.).

47. See, e.g., Jonathan Krim, *Legal Wars Have Changed Microsoft, CEO Says*, WASH. POST, Nov. 13, 2002, at E6; Katherine Pfleger, *Political Version of Access Gets Less Microsoft Money*, SEATTLE TIMES, Dec. 23, 2002, at B1.

alongside its legal troubles.⁴⁸ In the 1993–1994 election cycle, Microsoft gave \$109,000 in individual, PAC, and soft money contributions; by the 2000 cycle, this had grown to \$4.7 million.⁴⁹ The company, which did not even have a Washington, D.C. office until 1995, spent slightly over \$2.1 million on lobbying in 1997 and \$6.4 million in 2000, enlisting some of the most powerful influence brokers in the capital.⁵⁰ The implication is that Microsoft spun, bullied, and bought its way out of the legal jam in which it found itself.⁵¹

Common Cause President Scott Harshbarger set out the substance of this critique in September 2000:

While Microsoft has legal troubles in the antitrust arena, there's nothing at all new or illegal about what Microsoft is doing when it comes to the big money game in Washington In our nation's capital, money politics is business-as-usual. Indeed, Microsoft seems to have taken a page from the Phillip Morris playbook, combining large political contributions with strategic giving to the favorite charities of lawmakers, substantial support to think tanks that agree with them, ad campaigns, and other efforts to stir up grassroots support. What is extraordinary, besides the breadth and speed of the Microsoft conversion from Washington outsider to consummate insider, is how blatantly and shamelessly and without any sense of irony Microsoft made the transition.

What is also troubling is Microsoft's attitude towards our judicial system. It used to be that disputes were settled in court on their merits. And Microsoft has every right to make the best legal case it can. But Microsoft hasn't been content to leave this lawsuit in the hands of the courts. Using political money, the software giant has tried to bring pressure on the Justice Department's handling of the case and to win the battle in the court of public opinion.⁵²

48. In 1995, Microsoft founder Bill Gates told the *Washington Post*, "I'm sorry that we have to have a Washington presence [W]e thrived during our first 16 years without any of this. I never made a political visit to Washington, and we had no people here. It wasn't on our radar screen." *The Mind Behind the Microsoft Miracle*, WASH. POST, Dec. 3, 1995, at H1. Microsoft did not open a Washington, D.C., office until 1995. W. John Moore, *Ganging Up on Microsoft*, NAT'L J., Feb. 7, 1998, at 301. For a discussion on the lobbying activities of high-tech firms generally, see Jube Shiver, Jr., *Computer Nerds Are Becoming Policy Wonks*, L.A. TIMES, June 2, 1997, at D1.

49. Center for Responsive Politics, *Microsoft Antitrust Case: An Update on the Company's Lobbying and Campaign Contributions*, at http://www.opensecrets.org/alerts/v6/alertv6_26.asp (Sept. 6, 2001).

50. See Center for Responsive Politics, *Money in Politics Alert: Microsoft Antitrust Case*, at <http://www.opensecrets.org/pressreleases/microsoft/lobby.htm> (Sept. 6, 2001).

51. Dan Carney, *Microsoft's All-Out Counterattack*, BUS. WK., May 15, 2000, at 103.

52. COMMON CAUSE, *THE MICROSOFT PLAYBOOK* 2–3 (2000), available at

Harshbarger, echoing a common theme among reform groups, argues that Microsoft was wrong to use political tactics in fighting the antitrust lawsuit, and that these efforts succeeded in persuading the Justice Department to drop the case for illegitimate political reasons.⁵³

Were Microsoft's lobbying and public relations efforts legitimate? If our only concern is with process and formal equality, then the answer is probably no. Microsoft used its immense wealth to disrupt the judicial process, and it was able to leverage its concentrated economic power into a political advantage. Few people or companies would have the ability to respond by spending millions on lobbying and billions on philanthropy. Microsoft was, at a minimum, attempting to use its "inequality of private wealth" to "distort public deliberation in ways that are inconsistent with our mutual recognition as equal citizens."⁵⁴

However, criticism of Microsoft's political activity is based on the precarious notion that the subjects of coercive state action must limit their fight to turf chosen by the government. When we allow for the possibility that the antitrust action was misguided, politically motivated, or procedurally unfair, the idea that Microsoft might take its case out of the courtroom and appeal to legislators or public opinion becomes less troublesome. A corollary is that cutting off those alternative avenues of appeal is not necessarily a good idea and imposes costs of its own.

If we expand our set of concerns beyond strict equality to include minority protection against majority rights, or individual autonomy, it is possible to interpret Microsoft's lobbying in a different light.⁵⁵ Perhaps Microsoft was engaged in an entirely justifiable response to an unfair use of government power. There is certainly evidence that the Justice Department was treating Microsoft improperly—although this evidence is not conclusive.⁵⁶

<http://www.commoncause.org/publications/microsoft/microsoftstudy.pdf>; see also Joel Brinkley, *A Huge 4-Year Crusade Gets Credit for a Coup*, N.Y. TIMES, Sept. 7, 2001, at C5.

53. See COMMON CAUSE, *supra* note 52, at 2.

54. ACKERMAN & AYRES, *supra* note 1, at 13.

55. In any event, Microsoft's efforts almost certainly *hurt* its cause. In 1999, company lobbyists pressed Congress to cut \$9 million from antitrust division appropriations. KEN AULETTA, *WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES* 268 (2001). The effort succeeded only in provoking Justice Department attorneys into hard-line stances and "furthered [sic] blackened Gates's and Microsoft's reputations as bullies and brats." *Id.* at 269.

56. I suspect Professor Ayres, at least, is more sympathetic to the government's case.

Many antitrust experts and legal scholars pointed to the difficulties of applying antitrust law to the technological integration and intellectual property issues presented by the Microsoft case.⁵⁷ Others argued that the remedy was excessive,⁵⁸ or that the government failed to give enough credence to market forces that would correct competitive imbalances, thus repeating the mistake it made in the 1970s IBM antitrust action.⁵⁹

The behavior of Judge Thomas Penfield Jackson suggests that Microsoft was in fact not getting a fair hearing in court. The United States Court of Appeals for the District of Columbia found that Judge Jackson had engaged in “deliberate, repeated, egregious, and flagrant” violations of judicial conduct rules, by granting interviews with reporters during the trial and by seeking to keep the fact and substance of many of those interviews secret until the trial was over.⁶⁰ These interviews revealed what can only be viewed as an astonishing degree of bias against Microsoft. Judge Jackson compared company executives to gangland killers and drug traffickers, openly questioned Bill Gates’s credibility as well as the legal theory behind Microsoft’s defense strategy, expressed confidence in the government’s expertise, and implied that the breakup was analogous to hitting a mule in the head with a two-by-four to get its attention.⁶¹ Although the court did not overturn Judge Jackson’s findings of fact or law, it did overturn his remedy and disqualify him from further participation in the case.⁶²

See Ian Ayres, *Breaking Windows*, NEW REPUBLIC, Nov. 17, 1999, at 18; Ian Ayres & Aaron Edlin, *A Viable Alternative to Breaking Up Microsoft: Compulsory Licensing That Would Make Microsoft Compete with Its Past Self*, FINDLAW’S LEGAL COMMENTARY, Apr. 10, 2002, at http://writ.findlaw.com/commentary/20020410_edlin.html (last visited Mar. 20, 2003).

57. See, e.g., John E. Lopatka & William H. Page, *Antitrust on Internet Time: Microsoft and the Law and Economics of Exclusion*, 7 SUP. CT. ECON. REV. 157, 160 (1999); Edward Rothstein, *Wronging Microsoft*, COMMENT., Sept. 2001, at 46, 47; Samuel Noah Weinstein, *United States v. Microsoft Corp.*, 17 BERKELEY TECH. L.J. 273, 294 (2002). For a general discussion of the difficulties in applying antitrust law to “new economy” firms, see Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925 (2001).

58. Kenneth G. Elzinga et al., *United States v. Microsoft: Remedy or Malady?*, 9 GEO. MASON L. REV. 633, 634 (2001).

59. See John E. Lopatka, *United States v. IBM: A Monument to Arrogance*, 68 ANTITRUST L.J. 145, 146 (2000).

60. *United States v. Microsoft Corp.*, 253 F.3d 34, 107–08 (D.C. Cir. 2001).

61. *Id.* at 110–11.

62. *Id.* at 116.

Despite claims that Microsoft had inappropriately taken the fight out of the courtroom, the case was undeniably political from the beginning.⁶³ Microsoft's competitors had been lobbying the Justice Department for several years to take action.⁶⁴ Anti-Microsoft forces had hired some high-profile lobbyists of their own, such as 1996 Republican presidential candidate Bob Dole.⁶⁵ State Attorneys General saw the case as a potential cash-cow, another tobacco lawsuit that could pour billions of dollars into state coffers.⁶⁶ Also, the Justice Department was, some charged, particularly concerned about not looking soft on the company, fearing criticism from other software companies and the states involved in the litigation.⁶⁷ That politics played a role in the action from the beginning is unexceptional, as it is inevitable in complex and high-profile cases.⁶⁸ However, recognition of this fact undermines the claim that Microsoft was the one who was not playing fair.

In the end, Harshbarger and other critics may well have been correct that Microsoft used its political influence to impede the antitrust action, but this is not necessarily a problem. Although opinions certainly differ on whether or not the Justice Department was doing the right thing, we should hardly expect—much

63. See AULETTA, *supra* note 55, at 268.

64. Fred McChesney and William F. Shugart II argue that rival lobbyists had tried to convince the Federal Trade Commission to initiate an investigation of Microsoft and that they shifted to the Justice Department and Congress when their first tactic failed. Fred S. McChesney & William F. Shugart II, *The Unjoined Debate*, in *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE* 341, 344 (Fred S. McChesney & William F. Shugart II eds., 1995). "The DOJ's intervention in the Microsoft investigation," according to the authors, "occurred only after calls from Capitol Hill to Anne Bingaman, President Clinton's Assistant Attorney General for antitrust." *Id.*

65. Heather McCabe, *Anti-Microsoft Group Enlists Bob Dole* (Apr. 21, 1998), available at <http://www.wired.com/news/politics/0,1283,11798,00.html>.

66. See Steven Levy & Michael Hirsh, *A Blow to the Empire*, *NEWSWEEK*, Jan. 5, 1998, at 58, 59.

67. AULETTA, *supra* note 55, at 3–27.

68. See William J. Baer & David A. Balto, *The Politics of Federal Antitrust Enforcement*, 23 *HARV. J.L. & PUB. POLY* 111, 129 (1999).

There is political support for both sides in almost every antitrust case, thus diluting the public choice argument that politics drives enforcement decisions. Public choice advocates conveniently point to political support on one side or the other to support their theory that decisions were politically motivated. They can then argue that any expression of political interest or pressure corrupts the enforcement decision, even if there is no evidence that the decision was actually based on it.

Id.

less require—one of the world's largest corporations to sit quietly while the government attempted to dismantle it.⁶⁹

How might the antitrust case have played out under the Ackerman and Ayres system? It is possible that the lawsuit might never have been brought in the first place if Microsoft's competitors had not been able to press the point without their own campaign contributions and lobbying efforts. Microsoft would have been barred from making soft money contributions to the parties, and its political action committee ("PAC") would have had to raise its money via Patriot dollars and make contributions through the donation booth. Additionally, individual contributions from Microsoft employees under this system would have been anonymous. This would, if Ackerman and Ayres are correct, reduce the company's political clout. However, neither the donation booth nor the Patriot system would have had any bearing on the company's lobbying, public relations, or philanthropic efforts; we might even expect a more intense campaign in those areas, if the donation booth had cut off the traditional avenues of political influence. Microsoft might have engaged in a vigorous issue ad campaign on behalf of (or against) sympathetic (or hostile) legislators. The election of George W. Bush—or Elizabeth Dole, if we accept the scenario Ackerman and Ayres lay out in chapter eleven⁷⁰—would have meant a more market-oriented antitrust policy, and it is entirely possible that a settlement rather than a breakup would have occurred in any event.⁷¹

But the key question is this: Would the decisions made in this process, under the Patriot/donation booth system, be any more likely to be based strictly on the merits? Given the ambiguities in the state of antitrust law as it applies to high-tech industries and intellectual property, I strongly suspect the answer to this question would be no. Even in the absence of any "political" considerations, the lawsuit's progression might have been determined as

69. Ironically, Microsoft's arguably inept legal strategy and courtroom tactics were often attributed to a naïve belief that it would get a neutral and fair hearing in the legal arena. *See generally* AULETTA, *supra* note 55, at 210–27. "In this sense," wrote Ken Auletta, whose interviews with Judge Jackson were to play a key role in the appeals court disqualification, "they [Microsoft] were legal nerds, who believed vindication would be found in their temple of pure facts." *Id.* at 220. Microsoft intensified its lobbying and public relations efforts when it concluded that this was not the case. *See id.* at 223–27.

70. ACKERMAN & AYRES, *supra* note 1, at 164–71.

71. *See id.* at 160–78.

much by personality disputes between the principals, the opinion of Justice Department attorneys and the judge that Microsoft was arrogant, or the fact that Bill Gates gave a terrible deposition, as by ostensibly neutral factors.⁷²

I do not claim to offer a definitive analysis of either the state of antitrust law or the merits of the case against Microsoft. But my description raises the possibility, at least, that “politics” might have served the constructive purpose of correcting mistakes made by one branch of the government, that money is not always the root of all political evil, and that efforts to redistribute political power are not “free.”

III. CHALLENGING THE PHILOSOPHICAL FOUNDATION: IS THE DONATION BOOTH ANALOGOUS TO THE VOTING BOOTH?

The primary philosophical justification advanced for the donation booth is that we cast our ballots under precisely this veil of anonymity—since the introduction of the Australian ballot in the 1880s, virtually all voting is conducted secretly.⁷³ We have no verifiable record of how we vote, so we cannot prove to anyone that we actually cast our ballot one way or another.

A key cause—though certainly not the only one—of the ballot reform movement was the desire to stamp out the corruption and intimidation that occurred when voters cast ballots under the watchful eyes of party regulars.⁷⁴ Political parties produced separate ballots that they distributed to voters outside polling locations, and these ballots were printed to make it easy to see how people voted.⁷⁵ Votes were sometimes bought outright, and voters at times faced intimidation by employers and party officials or threats from violent mobs.⁷⁶ The abuses of the time have been well-documented, although they were not as frequent as we might think.⁷⁷ The secret ballot was an ideal solution to these problems.

72. The Assistant Attorney General in the Antitrust Division, Charles James, denies that politics played any role in his decision to change strategies. See Drew Clark, *Behind the Microsoft Deal*, NAT'L J., Nov. 17, 2001, at 3603, 3604.

73. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 143 (2000).

74. *Id.* at 159.

75. *Id.* at 28.

76. See *id.* at 160–61.

77. *Id.* at 159. Keyssar, in his definitive history of voting, notes that “recent studies

Once political parties could not observe how individuals voted, the incentive to strike corrupt bargains disappeared.

Why not, the thinking goes, extend this reasoning to campaign contributions? Both the secret ballot and the donation booth target "quid pro quo" corruption; the only difference is what is up for sale. The secret ballot prevents parties and candidates from purchasing the official act of an individual voter, while the donation booth prevents contributors from purchasing the official act of an elected official. If the secret ballot diminished vote buying and intimidation directed at voters, why wouldn't secret contributions have the same effect on officeholders?

The resulting situation [of the donation booth] will be structurally similar to the one created by the secret ballot. Protected by the privacy of the voting booth, you are free to go up to George W. Bush and tell him that you voted for him enthusiastically in 2000 even though you actually voted for Al Gore. Knowing this, neither the president nor you will be prone to take such protestations seriously.

The same "cheap talk" regime will disrupt the special-interest dealing we now take for granted. Just as the secret ballot makes it more difficult for candidates to *buy* votes, a secret donation booth makes it harder for candidates to *sell* access or influence. The voting booth disrupts vote-buying because candidates are uncertain how a citizen actually voted; anonymous donations disrupt influence peddling because candidates are uncertain whether givers actually gave what they say they gave.⁷⁸

The secret ballot-donation booth comparison is central to the whole idea behind *Voting with Dollars*. It is also an anchor point for the proposition that the donation booth would pass constitutional muster.⁷⁹ If secret voting is constitutional,⁸⁰ then why would secret contributions be any less acceptable? If the secret ballot is an unexceptional and non-controversial element of our

have found that claims of widespread corruption were grounded almost entirely in sweeping, highly emotional allegations backed by anecdotes and little systematic investigation or evidence Most elections appear to have been honestly conducted: ballot-box stuffing, bribery, and intimidation were the exception, not the rule." *Id.* at 159-60.

78. ACKERMAN & AYRES, *supra* note 1, at 6.

79. *Id.* at 3-11.

80. Ayres has argued elsewhere that he "cannot conceive that the Supreme Court would strike down this form of mandated anonymity as unduly burdening voters' free speech rights." Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 886 (1998).

political system, broadening it poses few theoretical or practical problems. It is, in their words, the "master analogy."⁸¹

But the voting booth and the donation booth are distinct in ways that undercut the claim that the "donation booth promises the effective control of existing pathologies without eliminating the positive features of private choice."⁸²

There are three key differences between the secret ballot and the donation booth. The first is that the secret ballot does not prevent candidates from learning a great deal about where their support lies. Elections produce far more information than a simple vote total or percentages. States invariably break the vote down by precinct,⁸³ a level of detail which permits finely honed analyses of voting behavior.⁸⁴ The individual ballot may be secret, but that veil does not keep the careful analyst from making reliable inferences from the wealth of data that is available. The voting booth does not stop candidates from identifying their core constituencies, which they presumably will favor with attention and benefits.⁸⁵ It is a mistake, then, to conclude that the voting booth severs the informational connection between voters and candidates.

But a second, more substantial difficulty lurks. The donation booth/voting booth comparison ignores the principle that the secret ballot is a personal right that a voter can waive. The state cannot compel me to reveal my vote, but neither may it prevent me from doing so if I choose. The donation booth, in contrast, is a mandatory state-imposed obligation that permits me no choice in the matter.

81. ACKERMAN & AYRES, *supra* note 1, at 154.

82. *Id.* at 25.

83. It is interesting to note that there are 531 precincts in Palm Beach County, Florida alone, which was the epicenter of the 2000 presidential election dispute. See, e.g., Bruce E. Hansen, A NonParametric Analysis of UnderVotes in the Palm Beach Presidential Vote: Implications of a Recount 3 (Nov. 19, 2000) (unpublished manuscript, on file with Department of Economics, University of Wisconsin-Madison), available at <http://www.ssc.wisc.edu/~bhansen/vote/florida4.pdf>.

84. *Id.* at 4; Jonathan N. Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793, 793-94 (2001).

85. Note, *The Dimensions of the Right To Vote: The Write-In Vote, Donald Duck, and Voting Booth Speech Written-Off*, 58 MO. L. REV. 945, 965-66 (1993). "As it stands, election results provide a wealth of information. Parties crunch and tabulate election results to identify strongholds and weak territories for themselves and their opponents." *Id.*

A century of legal theory and jurisprudence supports the position that the secret ballot is a personal right that protects the individual from coercion by the government, political parties, and employers—to name a few. As such, voters are free to say—and in many cases, to *prove*—how they voted. One author concluded that “[p]ublic policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it; his ballot is absolutely privileged.”⁸⁶ With few exceptions, state courts have adopted the same standard. In *Jenkins v. State Board of Elections of North Carolina*,⁸⁷ the court explained that

[the] privilege of voting a secret ballot has been held to be entirely a personal one. The provision has been generally adopted in this country for the protection of the voter and for the preservation of his independence, in the exercise of this most important franchise. But he has the right to waive his privilege and testify to the contents of his ballot. The voter has the right at the time of voting voluntarily to make public his ballot, and its contents in such case may be proven by the testimony of those who are present.⁸⁸

Similarly, in *McDonald v. Miller*,⁸⁹ the court reasoned that

[t]he guaranty of secrecy in exercising the right to vote is one personal to the voter. He has a right to insist that knowledge of his decision at the polls remain his own. Under our system it is a constitutional privilege which cannot be withdrawn by law. It is nonetheless a privilege personal to the voter. If he desires to waive it, he may. The mere fact that the voter permits someone else to learn for whom he voted does not destroy the validity of the vote.⁹⁰

Another example is contained in *Lett v. Dennis*.⁹¹ The court in *Lett* stated that “the statutory provisions for preservation of secrecy of the ballot is for the protection of the voter against the conduct of others, and in no manner is intended as restrictive of any voluntary act of his own.”⁹²

A number of federal courts have reached the same conclusion. In upholding the practice of allowing federal officials to observe

86. 2 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 1376 (Little, Brown & Co. 1927) (1868).

87. 104 S.E. 346 (N.C. 1920).

88. *Id.* at 347–48.

89. 90 So. 2d 124 (Fla. 1956).

90. *Id.* at 127.

91. 129 So. 33 (Ala. 1930).

92. *Id.* at 35.

the manner in which illiterate voters received assistance, a federal district judge concluded “[i]t . . . appears that the secrecy of a ballot can be compromised provided it is done at the request of the voter.”⁹³

There is an argument to be made that secret ballots should be compulsory if the concern is preventing fraud, and most states invalidate ballots which are marked in ways that could identify specific voters.⁹⁴ In *Nabors v. Manglona*,⁹⁵ the United States Court of Appeals for the Ninth Circuit expressed its opinion that ballots marked with code names—part of a vote-buying scheme discovered in a 1985 Northern Marianas Island election—probably should have been thrown out.⁹⁶ The court was concerned not only with fraud, per se, but also the fact that a vote identification scheme affects those who choose *not* to participate in it, since their votes become more identifiable.⁹⁷ The case for compulsory secrecy relies heavily on the premise that secrecy is necessary to

93. *United States v. Democratic Party of Greene County*, 254 F. Supp. 543, 546 (N.D. Ala. 1966).

94. For an example of state ballot requirements, see N.Y. ELECTION LAW § 7-106 (Consol. 1986 & Supp. 2002) and VA. CODE ANN. § 24.2-613 (Cum. Supp. 2002). Some state statutes, moreover, explicitly prohibit voters from showing their completed ballot to anyone in the polling station. For example, Minnesota Statutes section 204C.17 (2000) states that:

Except as authorized . . . a voter shall not reveal to anyone in the polling place the name of any candidate for whom the voter intends to vote or has voted If a voter, after marking a ballot, shows it to anyone except as authorized by law, the election judges shall refuse to deposit the ballot in any ballot box and shall place it among the spoiled ballots. Unless the showing of the ballot was clearly intentional, the voter shall receive another ballot

MINN. STAT. ANN. § 204C.17 (West 1992).

In many cases, however, state courts have interpreted this type of language loosely. To illustrate, in *In re Application of Langbaum*, the court stated that the secrecy of the ballot “is more of a personal right of the voter than a risk to the integrity of the process. Voiding the ballot and thus disenfranchising the voter is too harsh a remedy where the deficiency does not affect the integrity of the electoral process.” 493 A.2d 580, 583 (N.J. Super. Ct. App. Div. 1985). I have been unable to locate a single case in which a voter’s ballot was thrown out because he or she displayed it.

95. 829 F.2d 902 (9th Cir. 1987).

96. *See id.* at 905. The court asserted that

[a] system of placing identifying marks on voters’ ballots for the purpose of monitoring their electoral choices is repugnant to the democratic principles upon which the United States, the Commonwealth, and our common system of secret ballot elections are based. There can be absolutely no justification for such a scheme. It constitutes a direct subversion of the freedom to vote as one chooses.

Id.

97. *Id.*

protect individual voters from surveillance and potential retribution.⁹⁸ Not every state court subscribes to the idea of the secret ballot as an individual right,⁹⁹ but most do.¹⁰⁰

In many cases, moreover, the vote is not secret at all. Under federal law, voters with disabilities and those who are illiterate are permitted to have assistance from a person of their own choosing, as long as that person is not the voter's employer or union representative.¹⁰¹ Arkansas's state constitution requires paper ballots to be numbered in order to permit election officials to connect specific ballots to individual voters if an election is contested.¹⁰² In closed primaries, where only registered members of a political party are eligible to vote, voters must reveal their partisan preferences before being provided with a ballot.¹⁰³ Oregon, which now conducts its elections entirely by mail, requires voters to place their ballots in a secrecy envelope before sending them in to election officials.¹⁰⁴ Nevertheless, votes are still counted even if voters fail to adhere to this rule.¹⁰⁵

A joint MIT-Caltech study of voting systems in the 2000 election noted that "[t]he two primarily mail-in techniques (absentee voting and all-mail voting) are fundamentally not secret ballots."¹⁰⁶

Courts have long noted the lack of secrecy inherent in absentee balloting,¹⁰⁷ but none has ever held that this problem by itself violates constitutional or statutory provisions that mandate secret

98. *See id.*

99. *See, e.g.,* McCavitt v. Registrars of Voters, 434 N.E.2d 620, 631 (Mass. 1982). The court stated: "Since ballot secrecy safeguards society's interest in the integrity of elections, we hold that the right to a secret ballot is not an individual right which may be waived by a good faith voter." *Id.*

100. *Id.* (citing Wehrung v. Ideal Sch. Dist. No. 10, 78 N.W.2d 68, 69 (N.D. 1956); Belcher v. Mayor of Ann Arbor, 402 Mich. 132, 134 (1978)).

101. 42 U.S.C. § 1973aa-6 (2000).

102. ARK. CONST. amend. 50, § 3; Doug Thompson, *Traceable Ballots Come Under Fire: Secretary of State Plans Drive To Make Arkansas Voting Truly Secret*, ARK. DEMOCRAT-GAZETTE, Nov. 26, 2000, at B1. For a case interpreting Arkansas's constitutional provision, see *Womack v. Foster*, 8 S.W.3d 854 (Ark. 2000).

103. *See, e.g.,* ARIZ. REV. STAT. ANN. § 16-467 (West Supp. 2002).

104. *See* OREGON SEC'Y OF STATE, OREGON'S VOTE BY MAIL PROCEDURES MANUAL 29 (2002).

105. *Id.*

106. CALTECH/MIT VOTING TECHNOLOGY PROJECT, VOTING: WHAT IS, WHAT COULD BE 38 (2001), available at <http://www.vote.caltech.edu/Reports/index.html>.

107. *See, e.g.,* State ex rel Hutchins v. Tucker, 143 So. 754, 755 (Fla. 1932).

ballots. For example, in *Hutchins*, the Supreme Court of Florida held that an absentee voter has waived his right to a secret ballot altogether.¹⁰⁸ As a rule, voters have every right to show their completed absentee ballots to just about anyone.¹⁰⁹ Again, clear evidence of this proposition comes from state case law—in this instance, a 1982 California Court of Appeal decision:

[I]f a voter wishes to disclose his marked ballot to someone else, be it a family member, friend or a candidate's representative, he should be permitted to do so. . . . We suspect that many absentee voters disclose their marked ballots to other persons before placing them in the identification envelope for return to the elections official or the polling place. Such a voluntary disclosure cannot be deemed to violate the constitutional mandate [of secret ballots].¹¹⁰

The transparency of the voting booth under these circumstances is hardly trivial, given the increasing popularity of absentee balloting and mail-in votes. In the 2000 election, over 2.7 million Californians voted absentee, nearly one-fourth of all votes,¹¹¹ and 1.56 million Oregon voters cast mail-in ballots.¹¹² In Washington state, over half of all ballots are cast absentee.¹¹³ Nationwide, about one out of every seven votes was cast outside polling places in 2000.¹¹⁴ It is true that absentee voting is more susceptible to electoral mischief than the voting booth, but the problems have less to do with the lack of secrecy than with classic ballot box stuffing/fictitious voter fraud.¹¹⁵

Let me agree, for the sake of argument, that the secret ballot is in fact a form of compelled anonymity. Even so, the donation booth/voting booth analogy is still inaccurate because of a third distinction between the two. The specific act of casting a vote is

108. *Id.* at 756. Current Florida election rules specify that an absentee voter who returns her ballot by fax machine “will be voluntarily waiving [her] right to a secret ballot.” FLA. ADMIN. CODE ANN. r. 15-2.030(11)(e) (2002).

109. See, e.g., *Beatie v. Davila*, 183 Cal. Rptr. 179 (Cal. Ct. App. 1982).

110. *Id.* at 183.

111. Cal. Sec’y of State, Historical Absentee Ballot Use in California, at http://www.ss.ca.gov/elections/hist_absentee.htm (last visited Mar. 20, 2003).

112. 2000 General Election Statistical Summary, at <http://www.sos.state.or.us/elections/nov72000/other.info/genstats.pdf> (last visited Mar. 20, 2003).

113. Wash. Sec’y of State, Absentee Statistics, at http://www.secstate.wa.gov/elections/absentee_stats.aspx (last visited Mar. 20, 2003).

114. CALTECH/MIT VOTING TECHNOLOGY PROJECT, *supra* note 106, at 36.

115. Susan Schmidt & John Mintz, *Gore Case Spotlights a Trend in Remote Voting: As Use of Absentee Ballots Mushrooms Nationally, So Does Potential for Fraud*, *Electoral Experts Say*, WASH. POST, Dec. 6, 2000, at A27.

very different from what goes on in the far more amorphous and broad campaign environment, and is subject to a much higher degree of state control. In campaigns, voters assimilate the information they want in order to make the decision about which candidate to support; candidates attempt to mobilize their supporters, persuade the undecided, attack each other, and make promises about what they intend to do once elected. Campaigns are often about tactics, artifice, rhetoric, spin, and even outright falsehoods. Rather than police this activity, we leave it to the voters to sort through everything. Voting, in contrast, involves the discrete mechanisms of choice, the specific administrative processes, and the counting rules that determine the winner of a particular contest.

We draw distinctions between political arguments and campaign rhetoric—largely unregulated as part of the “marketplace of ideas”—and the physical process of marking and submitting a ballot, which is far more carefully controlled. A congressional candidate who stood outside a polling place handing out \$20 bills would probably be indicted for vote fraud. A candidate in the same race who says she would introduce a bill to cut taxes by \$1000 per household is guilty of nothing more than making a campaign promise.¹¹⁶

Thus, the state can exercise much more control over the voting process than it can over the campaign process.¹¹⁷ Restrictions on political speech that are permissible inside and around the polling place are not permissible beyond that.¹¹⁸ Consequently, even if it were established beyond a doubt that the secret ballot was mandatory, it does not follow that similar restrictions would be legal in other contexts.

The secret ballot comparison—the master analogy—is thus more rhetorical than analytical, relying as it does on a highly stylized and inaccurate picture of the voting booth. Voters, it

116. In *Brown v. Hartlage*, the Supreme Court of the United States held that a candidate who promised to serve at a reduced salary and return the savings to voters through lower taxes did not violate a law that banned vote-buying. 456 U.S. 45, 58–62 (1982).

117. The Supreme Court has adhered to this distinction in two key cases. In *Burson v. Freeman*, 504 U.S. 191 (1992), the Court upheld restrictions on electioneering within a narrow zone in and around polling places. *Id.* at 211. Also, in *Mills v. Alabama*, 384 U.S. 214 (1966), the Court overturned an Alabama law prohibiting the solicitation of votes on election day. *Id.* at 220.

118. See *supra* note 117.

turns out, cast their ballots in a variety of circumstances with the degree of ballot secrecy dependent almost entirely on what the individual voter *chooses* to keep secret.¹¹⁹ Ackerman and Ayres thus misidentify the nature of the right to a secret ballot—it vests with the individual voter, not the state.¹²⁰ The authors fail to acknowledge this difference. The voting booth/donation booth analogy obliterates the distinction between “I have no obligation” and “I am prohibited.” It is, therefore, a weak foundation for the entire system proposed in *Voting with Dollars*, and exposes the donation booth as the essence of the type of “command and control” regulation that the authors claim to eschew.¹²¹

IV. CHALLENGING THE PRACTICAL IMPLICATIONS: PARTICIPATION, CHEAP TALK, AND SECRECY

A. *How Many People Will Participate?*

While Ackerman and Ayres are agnostic as to the precise number of people who will participate in the Patriot program, throughout the book they repeatedly assert that candidates will have access to at least \$5 billion in Patriot dollars.¹²² While they do not specify how many people would have to participate for the program to work, they do note that a participation rate of twenty percent would be “a disaster,”¹²³ and that their “initiative would be a failure if fewer than fifty million voted with their Patriot dollars.”¹²⁴ The operating assumption is that most, if not all, of the 100 million people who vote in presidential elections would use their Patriot allocations.

How realistic are their expectations? Predictions of a significant increase in participation rely on what the authors call the

119. See *supra* notes 86–93 and accompanying text.

120. See *supra* notes 98–100 and accompanying text.

121. ACKERMAN & AYRES, *supra* note 1, at 4.

122. Ackerman and Ayres state that “\$5 billion or so would be coming into the campaign through the patriotic system.” ACKERMAN & AYRES, *supra* note 1, at 7. They later assert that there would have been an implied “yield of approximately 5 billion Patriots” if the system had been in place for the 2000 elections, given the 100 million persons who voted. *Id.* at 83. Moreover, they suggest that despite cutting the flow of private money, the system “will still yield a pool of \$6–7 billion.” *Id.* at 120.

123. *Id.* at 84–85.

124. *Id.* at 175.

"citizenship effect."¹²⁵ Under the Patriot system, voters would have a new reason to become engaged in politics, especially if they are able to see the collective impact of their participation.¹²⁶ To this end, Ackerman and Ayres assert that in using the Patriot system, "Americans will be giving renewed social meaning to their self-understanding as free and equal citizens, engaging in democratic deliberation."¹²⁷

Are they overly optimistic? Despite their claim that the Patriot system and the donation booth are so simple as to rejuvenate civic participation, the actual proposal asks a lot of voters. The funding scheme is unusually complicated, with different amounts credited to the card on different dates depending on the election cycle, whether or not there is a contested primary, whether an incumbent president is running for reelection, whether a candidate withdraws, and how many Patriot dollars and private funds were spent in the previous cycle.¹²⁸

Voters will have to be particularly attentive under the Patriot system, because they will never be completely sure exactly how much money they can give (or have left), will have to go to special offices to see that their contributions have been accurately distributed, and will have to make multiple contributions in several different races in order to use up their entire allotment of Patriot dollars. The plan imposes some obligations—individuals must register with the Federal Election Commission ("FEC").¹²⁹ In order to receive a Patriot card, individuals must register to vote or vote in those states that do not have pre-registration—Wisconsin and North Dakota.¹³⁰ Voters can register by mail or over the Internet, provided that they respond within thirty days to the confirmation letter sent to their home address and activate their

125. *Id.* at 15.

126. *Id.*

127. *Id.*

128. *Id.* at 181–85.

129. *Id.* at 67. This requirement represents a basic shift in the function of voter registration. For the first time, the process will be used for something other than ensuring voter eligibility and determining where people should vote. The administrative difficulties involved in meshing fifty different state registration systems with a single federal database are considerable. Leaving that aside, we ought to be skeptical about such a fundamental transformation—centralized federal control, the use of registration systems to determine who is eligible to contribute to campaigns—in the manner in which these data are handled.

130. *Id.*

card using a special code.¹³¹ To take advantage of the ATM disbursement option, voters must present an *existing* ATM, credit, debit, or government benefits card that is folded into the Patriot system.¹³² Voters with multiple ATM or credit cards will have to remember which card is tied to the Patriot system, and will also have to reapply every time a linked card is cancelled or an ATM account changes, unless the voter requests that the company roll the voter's campaign finance account over to another card.¹³³ One can easily imagine millions of voters, even after taking the considerable time to figure out where they are supposed to go and what they are supposed to do there, giving up after unsuccessfully rooting around for their cards—which will not, given the infrequency of their use, be carried in purses or wallets.

Ackerman and Ayres argue that most people would choose the linked-ATM option,¹³⁴ which solves the problem of losing cards that are used a few times every two years and the hurdle of traveling to a special office to make contributions. They assert that “[t]he only voters who will request free-floating cards are people without any electronic alternatives—and these, as we have seen, are not numerous.”¹³⁵ I suspect, though, that they have underestimated the amount of resistance that will attend this linking of private commerce with official government functions and political activity.

There is some empirical evidence about what might occur with the Patriot system. Minnesota has a contribution refund program that is identical in many respects to the Patriot plan.¹³⁶ Any individual can contribute up to fifty dollars to a state candidate and

131. *Id.*

132. *Id.* at 67–68.

133. These are not trivial problems. According to an industry web site, credit card holders possess an average of six-and-a-half cards per person. See U.S. Payment Card Information Network, CardFAQs, at <http://www.cardweb.com/cardlearn/faqs/2001/nov/20.amp> (last visited Mar. 20, 2003). If we include all types of credit cards, the average cardholder possesses nearly ten cards. See *id.*, at <http://www.cardweb.com/cardlearn/faqs/2002/jun/6.amp> (last visited Mar. 20, 2003). Electronic Fund Transfer cards and credit cards are often linked, so a single card may be tied to multiple accounts. Nearly 100 million credit cards are cancelled each year, and 150 million new cards issued. See *id.*, at <http://www.cardweb.com/cardlearn/faqs/2002/jun/10.amp> (last visited Mar. 20, 2003).

134. ACKERMAN & AYRES, *supra* note 1, at 68.

135. *Id.*

136. See Minn. Revenue, *Political Contribution Refund*, at <http://www.taxes.state.mn.us/individ/taxinfo/33pol.html> (last modified Dec. 10, 2002) (describing the refund program in Minnesota).

receive a refund from the state department of revenue.¹³⁷ Only candidates who agree to accept public funds and the attendant spending limits may receive these contributions, which are in effect free to the individual.¹³⁸ In the 1999–2000 election cycle, 169,283 refunds were issued.¹³⁹ The actual number of individuals who participated is probably slightly higher, since married couples who contribute \$100 are counted as having made a single contribution.¹⁴⁰ In 2000, Minnesota had a voting age population of 3,547,000.¹⁴¹ This means that 4.8% of eligible people participated in the Patriot-like political contribution program; participation rates in the 1998 and 1996 election cycles were, respectively, 4.6% and 4.5%.¹⁴² This participation level is an order of magnitude less than what would be necessary to make the Patriot system work. Participation would have to be five times higher even to reach the level of “disaster.”¹⁴³

Ackerman and Ayres argue that the Minnesota case is not comparable to the Patriot system, since obtaining the Minnesota refund requires paperwork and refunds take time.¹⁴⁴ “Patriot is different, allowing citizens countless opportunities to use their Patriot dollars at their ATMs without bureaucratic hassle.”¹⁴⁵ But obtaining a Patriot card can be much more complicated than getting a refund in Minnesota, and candidates there do everything they can to make the process as easy as possible for contributors. The Minnesota electorate is highly engaged, with turnout rates usually running about twenty percentage points higher than the

137. *Id.*

138. *Id.*

139. Minn. Campaign Fin. and Pub. Disclosure Bd., *Participation in Political Contribution Refund Program*, at <http://www.cfboard.state.mn.us/campfin/pcrprog.html>. (last visited Mar. 20, 2003) (listing participation rates by candidate and party). To arrive at this figure, the author accessed the table under “candidate” and “Political Party” for the years 1999 and 2000 and added the “Grand Total” figures in the “Number of Contributions” columns of each of the four tables. *See id.*

140. *See* Minn. Revenue, *supra* note 136.

141. Office of the Minn. Sec’y of State, *Minnesota State Primary Statistics 1950–2000*, at <http://www.sos.state.mn.us/election/elstat94.pdf> (last visited Mar. 20, 2003).

142. *See* Minn. Campaign Fin. and Pub. Disclosure Bd., *supra* note 139; *see also* Office of the Minn. Sec’y of State, *supra* note 141 (citing sources on voting age population and turnout); FED. ELEC. COMM’N., *Voter Registration and Turnout Statistics*, at <http://www.fec.gov/elections.html> (last visited Mar. 20, 2003) (listing national participation statistics).

143. ACKERMAN & AYRES, *supra* note 1, at 85.

144. *Id.* at 262–63 n.33.

145. *Id.*

national average.¹⁴⁶ For example, in 2000, the presidential election turnout was the highest in the country at 69.4%,¹⁴⁷ whereas turnout nationally was 51.3%.¹⁴⁸ Even if we discount the low participation levels because state-level contests typically generate less attention than national elections, it is a reasonable inference to conclude that Minnesota reflects an upper bound on foreseeable participation rates.¹⁴⁹

B. Cheap Talk and Reputation Effects

A—perhaps *the*—foundation of the donation booth concept is that non-donors must be able to behave exactly like donors, so that candidates cannot ever be completely certain who really gave them money and who is lying. If potential donors want to receive the purported benefits of contributing—access, favorable legislation, et cetera—without actually bearing the cost of donating, they can simply claim that they donated. In the presence of such free-riding and without proof one way or the other, candidates would have no way of being certain which claims were true and which were not. Ergo, nobody gets special treatment because of a donation.

The donation booth can only work—absent authoritarian and patently unconstitutional prohibitions on telling a candidate that you have made a contribution—if candidates are sufficiently confused by this cheap talk regime.

146. For a comparison of voter turnout nationally and in Minnesota in the 1996 elections, compare Fed. Elec. Comm'n., *National Voter Turnout in Federal Elections*, at <http://www.fec.gov/pages/htmlto5.htm> (last visited Mar. 20, 2003), with Fed. Elec. Comm'n., *Voter Registration and Turnout—1996*, at <http://www.fec.gov/pages/96to.htm> (last visited Mar. 20, 2003). See also *supra* note 142.

147. Office of the Minn. Sec'y of State, *November 7, 2000 General Election Official Results*, at http://elections.sos.state.mn.us/ENR2000_General/ElecMenu.htm (last visited Mar. 20, 2003).

148. Fed. Elec. Comm'n., *Voter Registration and Turnout 2000*, at <http://www.fec.gov/pages/2000turnout/reg&to00.htm> (last visited Mar. 20, 2003).

149. The three-dollar United States income tax checkoff, used to fund the presidential election campaign fund, is another benchmark. See Presidential Election Campaign Fund Act of 1966, tit. III, § 302(a), Pub. L. No. 89-809, 80 Stat. 1587 (codified at 26 U.S.C. § 6096 (2000)). Checking this box on an income tax return simply designates three dollars to the fund, used to provide matching grants and public funding to presidential candidates. *Id.* Yet only about 12% of all filers participated in 2001, even though doing so is effortless and cost free. See INTERNAL REVENUE SERVICE, TAXPAYER USAGE STUDY FOR TAX YEAR 2001, available at <http://www.irs.gov/pub/irs-soi/01tpusct.xls> (last modified Jan. 7, 2003).

Both theory and practice, however, suggest that candidates will not face such confusion. Even under an anonymous system, committed donors will still have incentives to be honest with candidates, and non-donors will face compelling disincentives against misrepresentation. In a political environment where ongoing relationships are vital to both candidates and interest groups, the desire to be seen as credible will, over the long term, provide a powerful reason for interest groups to tell the truth.¹⁵⁰

Cheap talk falls into two categories: (1) claims made by people who are purposely trying to inject confusing information into the election; and (2) those made by otherwise credible contributors who want to obtain influence or access without actually spending any money. Legislators and candidates are unlikely to be confused by the first type of false claim, although voters might be. No sensible politician will believe the National Rifle Association ("NRA") if it claims to have given money to Representative Carolyn McCarthy (D-NY),¹⁵¹ or Barbra Streisand if she says she contributed \$10,000 to George W. Bush's reelection committee.¹⁵² Those claims will not do Barbra Streisand or the NRA any good, either, since the chief result is that their own credibility will be undermined.

It is the second type of false claim that is more interesting, and more likely. Will candidates truly be confused by cheap talk? How hard will it be for a candidate to assess the credibility of a claim, either public or private, that a donor gave \$10,000?

Not hard at all, as it turns out. Consider that after ten years, or however long a period before records are revealed for auditing purposes, everyone knows that a false statement is certain to be exposed.¹⁵³ When a false claim becomes known, the people who made it will see their credibility drop to zero in all future interactions, as well as face retribution from politicians who will be un-

150. See generally Joel Sobel, *A Theory of Credibility*, 52 REV. ECON. STUD. 557 (1985) (discussing the importance of credibility and the behaviors that effect one's credibility).

151. Robin Joner, *Presidential Race Could Turn on Bush's Appeal to Women*, N.Y. TIMES, Mar. 26, 2000, at A1. The Congresswomen is quoted as saying "you can take on the N.R.A. and win" in a comment made to the Million Mom March. *Id.*

152. *Political Capital: Hoping To Jump-Start His Campaign for Governor, Grossman Airs TV Ads*, BOSTON GLOBE, Feb. 17, 2002, at B5.

153. Some claims would be identifiable as false prior to this—a person who claimed to have given \$100,000 to a candidate who only raised \$50,000 over an entire election cycle would be exposed quickly as a liar.

happy about being duped. Even those donors who indeed want to send confusing signals would benefit by a longstanding pattern of honesty, because that reputation would enhance the credibility of a false claim if it is ever made, and even a single false claim would raise doubts about a donor's true activities.¹⁵⁴ Nobody with long term stakes in the political process will be willing to risk this.

The cheap talk regime, then, assumes that there are no reputational consequences to lying. This is flatly contradicted not only by bargaining theory,¹⁵⁵ but also by overwhelming evidence that virtually everyone involved in striking political bargains is acutely aware of the importance of reputation.¹⁵⁶ Indeed, reputation is central to political deals precisely because most are unenforceable if one party fails to hold up her end of the bargain.¹⁵⁷

Ackerman and Ayres assert that "after ten years, the data will be too stale for donors and politicians to use as a basis for future-oriented dealings."¹⁵⁸ This is not so. The public might not care, but it is a certainty that parties, legislators, candidates, and interest groups will. They will sift the data carefully, so that they can assess the credibility of the "cheap talk" that they are currently hearing.

The most likely consequence of the donation booth is that it would deprive the public, but not the candidates, of information regarding donations. Large donors would simply make their

154. See generally Barry Nalebuff, *Rational Deterrence in an Imperfect World*, 43 WORLD POL. 313 (1991) (discussing how reputation and misperception can lead to an infringement of payoffs).

155. See, e.g., Jeong-Yoo Kim, *Cheap Talk and Reputation in Repeated Pretrial Negotiation*, 27 RAND J. ECON. 787 (1996) (discussing reputation and broken promises in the context of pretrial negotiation); Anne Sartori, *The Might of the Pen: A Reputational Theory of Communication in International Disputes*, 56 INT. ORG. 121, 140 (2002); Sobel, *supra* note 150, at 557–73 (arguing reliability can be communicated through action and credibility is achieved by correctness).

156. See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* (1990); ERIC A. POSNER, *LAW AND SOCIAL NORMS* 49–67 (2000); Terry Sullivan, *Bargaining with the President: A Simple Game and New Evidence*, 84 AM. POL. SCI. REV. 1167 (1990) (pointing to the fact that some people make misrepresentations unsystematic, which avoids "nicks" to their reputations); see also Nalebuff, *supra* note 154 (focusing on the role of reputation in establishing deterrence in the world).

157. Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 138–40 (1988).

158. ACKERMAN & AYRES, *supra* note 1, at 99.

claims privately to candidates. These private signals would still be credible, and candidates would still know with reasonable certainty who is giving to them. But, the public would be in the dark. Currently, even though the public might not know what interest groups *say* to candidates, we do know what they *give*. Under the blind trust regime, neither communications nor contributions would be publicly visible. This is not a step forward.

Moreover, to the extent that the cheap talk regime works, it will have the effect of driving valuable information out of the electoral arena. If candidates are to be confused about the identity of their real contributors, then it is axiomatic that voters will be even more so. The advantages of disrupting potential corruption must therefore be balanced against the disadvantages in forcing voters to make choices without important cues.

A significant literature attests to the importance of information shortcuts, or cues that voters use to evaluate candidates when detailed information is hard to come by or absorb.¹⁵⁹ Key among these is the identity of a candidate's supporters. Such cues allow otherwise unsophisticated and uninformed voters to act rationally, in the sense that they can make the same decisions that they would have made if they had invested considerable time investigating the issues.¹⁶⁰ Interest groups have the incentive and the ability to evaluate political information about a candidate's preferences, behavior, history, and policy positions.¹⁶¹ Ackerman and Ayres dismiss this notion with the assertion that "[r]esearchers have yet to find an election . . . in which information about funding actually made a difference in the outcome."¹⁶² Even if true, this misses the point. Elections need not turn on this information for voters to find it useful.¹⁶³ Candidates certainly behave as though this information matters, and one of the first steps in any

159. See Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 63 (1994) (discussing how voters encounter information surrounding referendums).

160. See *id.*

161. *Id.* at 65-67; see SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* 216-17 (1991) (analyzing a reasoned voter and the steps they take to obtain information to simplify choosing candidates in the election process).

162. ACKERMAN & AYRES, *supra* note 1, at 250 n.2.

163. One reason that contribution data is less useful than it might be is because of the delay in reporting. Quicker disclosure will almost certainly enhance the effect of this information.

campaign research effort is a study of where the opponent's money comes from.¹⁶⁴

A group's willingness to commit its resources to a candidate is an unambiguous signal of where it stands, and knowledge about who has given money can be vital to a voter's evaluation of a candidate. For example, has the candidate made donations to EMILY's List,¹⁶⁵ or the Conservative Victory Fund?¹⁶⁶ Handgun Control Inc.,¹⁶⁷ or the NRA Political Victory Fund,¹⁶⁸ or National Abortion Rights Action League¹⁶⁹ or Right to Life?¹⁷⁰ Driving this information out of the campaign, or intentionally introducing confusion, seems unlikely to improve the election process.

C. *A New Category of Government Secret?*

No matter how much attention is devoted to the process of maintaining the confidentiality of contribution data, some unambiguous, traceable, and authoritative record of each transaction would have to exist. The need for such definitive records is obvious, as without them it would be impossible to carry out the audits necessary to insure that contributions go where the donors intended, apply contribution limits, or enforce any kind of source restriction, such as a ban on foreign or corporate contributions.

164. John Bovee, *How To Do Opposition Research on the Internet*, CAMPAIGNS & ELECTIONS, Sept. 1998, at 48. Many special interest group websites list voting records of incumbent candidates. *Id.* There are also campaign contribution reports online so one may examine where a candidate received his or her funding. *Id.*

165. See EMILY's List, *Who is EMILY*, at <http://www.emilyslist.org> (last visited Mar. 20, 2003) (defining the organization as a group of women who raise money for women candidates).

166. See Conservative Victory Fund, *Organization*, at <http://www.conservativevictoryfund.org/about.htm> (last visited Mar. 20, 2003) (stating that the organization's purpose is to elect conservatives to the United States Senate and House).

167. See The Brady Campaign to Prevent Gun Violence, at <http://www.handguncontrol.org> (last visited Mar. 20, 2003) (explaining the need for gun control under the crusade of former White House Staff member Jim Brady).

168. See Nat'l Rifle Assoc., *Political Victory Fund*, at <http://www.nrapvf.org> (last visited Mar. 20, 2003) (giving financial support to legislators who support the association's positions).

169. See Nat'l Abortion Rights Action League, *About Us: The NARAL Pro-Choice America Mission*, at <http://www.naral.org/about/index.html> (last visited Mar. 20, 2003) (supporting a woman's right to choose).

170. See Nat'l Right to Life, *Mission Statement*, at <http://www.nrlc.org/missionstatement.htm> (last visited Mar. 20, 2003) (stating that the goal of the organization is to protect innocent human life).

Many people—hundreds, possibly thousands—would need routine access to this information, and the donation booth system would have to mesh closely with existing financial institutions to insure that contributions are properly debited from donor accounts.

It is thus a given that the information will exist, and no encryption code or organizational wall could keep names separate from dollar amounts forever. How, then, do you protect it from being revealed? The procedural solution offered in *Voting with Dollars* is to limit the number of people with access to the data, prohibit trust employees from fraternizing with candidates or campaign staff, and to insist that under no circumstances would donor names be revealed beyond the \$200 threshold.¹⁷¹ Ackerman and Ayres also propose criminal penalties. Section 21 of the Citizen Sovereignty Act, Ackerman and Ayres's model statute, provides for criminal penalties of up to five years in prison and a \$25,000 fine for violating "any provision" of the act.¹⁷² Ayres has suggested that the Federal Election Commission ("FEC") should be authorized to conduct field audits to see if campaigns and trusts are willing to compromise donor anonymity.¹⁷³

It is not at all clear how such rules would work, and even less clear that they could be enforced. Ultimately, the blind trust regime would have to be more airtight than the national security classification system. Otherwise it is inevitable that those with access to the information would find a way to transmit it to candidates or the public. In the extreme case, trust employees could simply provide documents to reporters or candidates, or selectively disclose particular contributions through leaks. The dismal track record of restrictions on the dissemination of political information—such as leaks of Voter News Service exit poll data and the total flouting of the French ban on the broadcast of public opinion polls within one week of elections—should engender considerable skepticism that contribution records would be kept under wraps.¹⁷⁴ Once the information is out, the government is totally powerless to do anything about it.

171. ACKERMAN & AYRES, *supra* note 1, at 183–85.

172. *Id.* at 216–17 (Citizen Sovereignty Act § 21).

173. Ayres & Bulow, *supra* note 80, at 860 n.2.

174. Between 1977 and 2002, French law prohibited the publishing of public opinion polls within one week of an election, though it was legal to conduct them. *Les sondages électoraux pourront être publiés jusqu'à la veille du scrutin* [France Approves Last-Minute

The possibility of private traffic in contribution data leads to all manner of pathologies. Candidates may seek damaging information about their opponents, in the hope of exposing contributions from out of favor interests or individuals. Alternatively, they could simply assert that their opponents have taken tainted money, and the same restrictions which prevent a candidate from knowing who has given her money will prevent her from proving that she has not received suspect funds. In addition, absent full disclosure, the public would be denied the information necessary to evaluate the competing claims.

The notion that criminal penalties will be applied to the release of contribution data is nothing less than shocking, and belies the claim that *Voting with Dollars* represents minimal restrictions on speech. There is neither a coherent legal foundation nor any precedent for punishing the disclosure of campaign contribution data. The donation booth requires the creation of a completely new category of government secret—data on how much individuals contributed to federal candidates. Restrictions on the disclosure of this top-secret information would have to be backed up with penalties analogous to those applied to the unauthorized release of national defense information.

No contemporary category of information currently protected from unauthorized disclosure by the government provides any support to the donation booth concept of coercive secrecy. This covers a broad range of material: autopsy photographs of NASCAR driver Dale Earnhardt; juvenile offender records; Internal Revenue Service flags for auditing income tax returns; insider trading information; census responses; student academic records;

Polling on Election Eve], AGENCE FRANCE PRESSE, Jan. 16, 2002 [hereinafter *France Approves Last Minute Polling*]; see Charles Trueheart, *French Voters Pluck Forbidden Polling Data from the Internet*, WASH. POST, May 23, 1997, at A36. The rise of the Internet, which allowed voters to access foreign web pages not affected by French law, made the statute unenforceable. See *France Approves Last Minute Polling*, *supra*; see also Trueheart *supra*. Legislators reduced the blackout period to twenty-four hours in January 2002. Threats by Voter News Service ("VNS") to sue anyone who leaked its exit polls did not prevent widespread Internet distribution. See Jacob Weisberg, *Exit Poll Madness*, SLATE, (Nov. 7, 2000) at <http://slate.msn.com/?id=1006436>. Jack Shafer points out the hypocrisy of news anchors pretending not to know the election results, when in fact they have already seen VNS projections by early afternoon on election day and know who has won. Jack Shafer, *All the News That's Fit To Suppress*, WALL ST. J., Mar. 15, 2000, at A26. Despite the VNS embargo, "[a]ll day long, media and political elites fill their friends' e-mail and voice-mail boxes with the latest numbers. The exit-poll numbers are the worst-kept secret in the world." *Id.*

judicial disciplinary proceedings; grand jury testimony; individual banking, medical, or tax records; trade secrets; classified national security or intelligence information; diplomatic communications; nuclear weapons data; even secret ballots. At stake with every other type of privileged information is an individual privacy right, a property or proprietary interest, or a specific harm to vital government functions, such as national security or law enforcement, that would result from release. In many cases, the information that the government must keep secret can be released by the person who originated it.¹⁷⁵ In others, the government cannot be forced to release information, as with claims of executive privilege, but is free to do so.

Nothing of the sort applies to the donation booth, in which the parties to a particular contribution would, presumably, want the information released, but are prevented from doing so. In no way can the consequences of releasing contribution data be compared to the harm in releasing information on a law enforcement investigation or a diplomatic initiative, nor can it be claimed that release would interfere with efficient governmental administration. There is no legitimate, let alone compelling, interest in keeping this information confidential.

Ackerman and Ayres defend the legality of the donation booth, arguing that there is no inherent right to obtain government records. The First Amendment "has never operated as a sword requiring the government to hand over all information in its possession."¹⁷⁶ However, they overstate the government's ability to keep secret whatever it wants. Although federal courts have ruled that "[t]here is no inherent constitutional right of access to government information,"¹⁷⁷ other court decisions have placed important limits on this power. In *McGhee v. Casey*,¹⁷⁸ the D.C. Circuit added a key qualification, concluding that "citizens have no first amendment right of access to *traditionally nonpublic* government

175. Political candidates often release their income tax returns; patent applications are confidential, but nothing prevents an inventor from revealing that he has submitted an application; individuals may waive their privacy rights with census data or academic records; and so on.

176. ACKERMAN & AYRES, *supra* note 1, at 148.

177. *Pfeiffer v. Cent. Intelligence Agency*, No. 91-736 (NHJ), 1994 U.S. Dist. LEXIS 2650, at *12 (D.D.C. Mar. 3, 1994).

178. 718 F.2d 1137 (D.C. Cir. 1983).

information.”¹⁷⁹ The Supreme Court of the United States has held that “[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information *within the government’s control*.”¹⁸⁰ Justice Brennan argued that “[t]hese cases neither comprehensively nor absolutely deny that public access to information may at times be implied by the First Amendment and the principles which animate it.”¹⁸¹

The conditional nature of the government’s power to classify information poses several problems for the donation booth. Contribution data is *not* information that has been traditionally private, given the broad sweep of campaign finance disclosure laws in the twentieth century.¹⁸² Nor is contribution data truly within the government’s control, as the government neither originates the information nor keeps it private. Decisions about where the money goes and how much is given, are made by private individuals, and this information is used to distribute campaign funds to other private individuals.¹⁸³ At the very least, the donation booth runs against the grain of decades of progress in sunshine laws and other guarantees of government openness.

Here, Ackerman and Ayres make another erroneous comparison, arguing that donation booth secrecy is analogous to the secrecy of the census forms.¹⁸⁴ There are two crucial differences, though. First, completing the census form is *mandatory*, and individuals face prosecution if they refuse to participate.¹⁸⁵ The government *requires* individuals to provide the information, and there is no right to opt out.¹⁸⁶ The fact that the information is kept secret is one reason that courts have held that this requirement does not violate privacy rights.¹⁸⁷ Second, there is no law which prevents an individual from showing her completed census

179. *Id.* at 1147 (emphasis added).

180. *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (emphasis added).

181. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 (Brennan, J., concurring).

182. *See generally* *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (upholding the disclosure requirements, limits on campaign contributions, limits on political expenditures, and public financing of elections in the Federal Election Campaign Act).

183. *See* 11 C.F.R. § 9034.1 (2002).

184. ACKERMAN & AYRES, *supra* note 1, at 148–49.

185. 13 U.S.C. § 221 (2000).

186. *Id.*

187. *See, e.g.*, *United States v. Rickenbacker*, 309 F.2d 462 (2d Cir. 1962).

form to anyone, and individuals are free to waive their privacy rights.¹⁸⁸ Once again, the authors fail to recognize the distinction between state coercion and a positive grant of individual rights.

Although the government probably does have the right to fire trust employees for revealing what they know by making confidentiality a condition of employment, it is hard to see how sanctions could be applied to *former* trust employees. The prohibitions are so broad that they would undoubtedly chill protected speech. Take, for example, the hypothetical case of a current trust employee who knows the identity of contributors and recipients. Next consider the following two statements made by that employee to, say, a *Washington Post* reporter, or on CNN:

(1) "Bill Gates contributed \$25,000 to Senator Smith in 2004."

(2) "Bill Gates is a credible person who tells the truth about his politics. If he says he's going to do something, he'll do it. If he says he did something, he did it."

Under the Citizen Sovereignty Act, the first statement would clearly be illegal since it violates section 8(b)(1).¹⁸⁹ However, what about the second statement? There is no reference to a specific contribution, although the statement might run afoul of the "any other information about any contributor" prohibition.¹⁹⁰ If this subjects the employee to prosecution or dismissal, the statute covers a sweeping amount of political speech and almost certainly runs afoul of the First Amendment. If not, the donation booth leaves open many opportunities to convey valuable information about what is going on behind the curtain.

Consider the case of a trust employee blowing the whistle on a false contribution claim. If John Doe, a prominent CEO, falsely claims to have given \$50,000 to a Senate candidate, and a trust employee publicly states that this claim is false, is there a violation? If the claim is really false and no contribution has been made, then there is no "contributor or contribution to the blind

188. 13 U.S.C. § 9 (2000).

189. ACKERMAN & AYRES, *supra* note 1, at 199 ("No employee may disclose the amount or status of specific contributions or the identity or any other information about any contributor or contribution.") (Citizen Sovereignty Act § 8(b)(1)).

190. *Id.* (Citizen Sovereignty Act § 8(b)(1)).

trust”¹⁹¹ to trigger any secrecy requirements, and trust employees are free to debunk at will.¹⁹²

In fact, under the logic of the donation booth, there is no reason to bar any statements by trust officials about contributions or recipients. What the donation booth is designed to prevent is *proof* of contributions, not speech about whether a contribution has been made, or how much, or by, or to whom. Mere knowledge that a contribution has been made is insufficient grounds to prohibit statements about it, since an individual who makes a contribution to the blind trust knows with certainty whether or not it has in fact been made. An individual who proclaims her \$10,000 donation to Senator Smith has no more proof of her contribution than does a trust employee who says that the contribution has actually been made. Under the donation booth, the credibility of those claims is identical, since neither one is verifiable. What is missing is proof that a contribution has been made and not revoked. What is the basis then, for restricting the *speech* of trust employees, as opposed to the release of actual records? There is none.

From a practical standpoint, the Patriot/donation booth is unlikely to achieve its goals. Ackerman and Ayres overstate the simplicity of their plan and the degree to which it will revitalize participation. The donation booth will not disrupt credible communications between candidates and donors, but will merely drive those signals underground. The plan creates an entirely new category of government secret, along with all of the coercive controls that accompany it.

But, protest Ackerman and Ayres, “[w]e are not in the business of restricting speech. We are interested only in enhancing the capacity of all Americans to join the debate [T]here is never any effort to repress speech in the name of equality.”¹⁹³ This assertion is unambiguously false because under the Patriot/donation booth, private citizens are denied the ability to prove their support for a candidate.¹⁹⁴ Furthermore, voters are denied information about the identities of a candidate’s support-

191. *Id.* (Citizen Sovereignty Act § 8(a)).

192. This would not be the case, of course, if Doe claimed to have given \$50,000 but actually gave, say, \$500.

193. ACKERMAN & AYRES, *supra* note 1, at 92.

194. *Id.* at 98–99.

ers and candidates are even denied information about the identities and intensities of their own supporters.¹⁹⁵ Government employees—current, and perhaps former—are prohibited, under pain of criminal sanction, from revealing information that has, until now, been considered crucial in evaluating the qualities of candidates and government policy.¹⁹⁶ The claim that these policies do not amount to coercive restrictions on speech cannot be taken seriously.

V. CONCLUSION

Ackerman and Ayres claim to offer a novel way of removing the pernicious elements of our campaign finance system with little or no cost to essential liberties. I have attempted to argue that they are wrong in this position. My objections to their plan are both philosophical and practical. The proposal, far from reflecting a modest change, requires a fundamental rearranging of how the electorate and government relate to one another.

The Ackerman and Ayres prescription requires us to elevate political equality as the only—and if not the only, certainly the most important—goal of our campaign finance system.¹⁹⁷ In the context of democratic politics, though, there are other values long considered crucial in the theoretical underpinnings of American political culture. These values include fair determination of preferences, individual autonomy, free speech, and protecting minority rights against the tyranny of the majority.¹⁹⁸ None of these, or,

195. *Id.* at 94.

196. *Id.* at 98–100.

197. “It isn’t enough to count every vote equally on election day. The American citizen should also be given a more equal say in funding decisions.” *Id.* at 4. “Even when our votes count equally, inequality of private wealth may distort public deliberation in ways that are inconsistent with our mutual recognition as equal citizens.” *Id.* at 13. “No less than the abolitionists, we envision democratic politics as a distinct sphere of equal citizenship.” *Id.* at 32. Under the Patriot system, “[w]hen the share of private contributions exceeds one-third of the whole, we consider this a dangerous sign of incipient oligarchy.” *Id.* at 89. A participant in the Patriot system “will be doing his bit to carve out a special space for democratic citizenship—in which ordinary people confront one another as equals as they hammer out the basic terms of their ongoing social contract.” *Id.* at 161.

198. Political equality and popular sovereignty are not absolute goals; we must ask ourselves how much leisure, privacy, consensus, stability, income, security, progress, status, and probably many other goals we are prepared to forego for an additional increment of political equality. It is an observable fact that almost no one regards political equality and popular sovereignty as worth an unlimited

for that matter, any other values can be maximized without some cost to the others. Furthermore, it is the institutions and processes of American politics that are designed to achieve a balance among them.

A system that enforces equality of both vote and influence ignores the benefits of complementary, rather than consistent, government structures. Madisonian governmental design had complementary features that balanced the limitations of one aspect with strengths of another. For example, the equal vote populism of the House of Representatives was balanced against the state-based inequalities of the Senate. Similarly, the parochialism of the legislature was balanced against the national perspective of the executive. The trend in reform has been to make the features of United States Government at the state and national levels more consistent rather than complementary. But, this consistency comes at the cost of balance and may in the long run magnify inherent weaknesses in the system. For instance, decisions might become overly responsive to ill-formed majoritarian preferences.¹⁹⁹

In the end, what appears to motivate Ackerman and Ayres is a deep suspicion of politics—as the term is commonly understood—as a way of making public policy or resolving important disagreements. The prospect of voters, interest groups, and politicians brazenly pursuing their self-interest, rewarding constituencies, or pandering to local biases quite obviously makes them uncomfortable. Politics, when viewed through this lens, inevitably corrupts what would otherwise be a rational and consensual process, diverting official judgments away from what everyone should recognize as the common good. Government benefits—i.e., tax breaks, contracts, favorable regulatory decisions, and subsidies—are purchased by the politically connected and wealthy. Election campaigns, rather than processes of mobilization and accountability, are a flagrantly unfair means through which powerful special interests and unbeatable incumbents manipulate voters through an onslaught of dishonest television advertising. Campaign money is literally the legal tender through which these fraudulent practices are conducted.

sacrifice of these other goals.

ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 51 (1956).

199. Bruce Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 136 (1995).

Ackerman and Ayres would much prefer that policy emerge through careful deliberation, among equals, over what is in the public interest. This conceptual framework justifies attempts to impose a particular kind of normative rationality on politics and campaigns, in which voters and candidates set aside all bias and deliberate solely on the basis of policy rather than self-interest.

This view has a long and distinguished lineage. James Madison argued that "[t]he aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society. . . ." ²⁰⁰ He also expressed his hope that the new government would be composed of "men who would be able to pursue vigorously what they saw to be the true interest of the country free from the turbulence and clamors of 'men of factious tempers, of local prejudices, or of sinister designs.'" ²⁰¹ It is entirely consistent with the Burkean view of the legislator as trustee and Parliament as "a *deliberative* Assembly of *one* Nation, with *one* Interest, that of the whole; where, not local Purposes, not local Prejudices ought to guide, but the general Good, resulting from the general Reason of the whole." ²⁰²

Ackerman and Ayres subscribe to this view that the *public* interest should dominate the deliberative process. Their's is a reasonable normative position, but they run into trouble when they explicitly try to purify politics of self-interest.

It is clear that this is what they would like to do. Throughout *Voting with Dollars*, Ackerman and Ayres repeatedly attack the notion that individuals or groups would use the political process to advance their own economic, social, or geographic interests, and defend the Patriot/donation booth as a way of making this much harder. They state that "[a]s Americans look a generation or two ahead, they will find it impossible to predict whether the new paradigm will further their concrete interests. They are obliged to consider the problem from behind a veil of ignorance that deprives them of personal self-interest." ²⁰³ Under the Patriot

200. THE FEDERALIST NO. 57, at 289 (James Madison) (Bantam Classic ed., 1982).

201. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 505 (1969) (quoting a letter from James Madison to Thomas Jefferson (Oct. 1787)).

202. Edmund Burke, Speech After the Poll to the Electors at Bristol (Nov. 3, 1774), in 3 THE WRITINGS AND SPEECHES OF EDMUND BURKE, 64, 69 (Paul Langford et al. eds., 1996).

203. ACKERMAN & AYRES, *supra* note 1, at 176.

plan, “[m]ost patriotic PACs will tend to define themselves over issues that transcend local self-interest.”²⁰⁴ The “donation booth tends to filter out self-interested contributions, while allowing an unimpeded flow of ideological gifts,”²⁰⁵ and also protects an individual who chooses to make a contribution, because “she has no fear that her extra gift can be disparaged as an effort at pursuing her self-interest. The context makes it clear that she is making a genuine gesture of concern for the fate of her country.”²⁰⁶

There is a difference between a political system that does nothing but advance private over public interests, and a political system that seeks to channel self-interested behavior in productive ways. The rationale for creating a system of checks and balances—the primary characteristic of our constitutional structure—was precisely to take advantage of the self-interested motivations of most political actors and to prevent abuses. James Madison wrote “[a]mbition must be made to counteract ambition.”²⁰⁷ The notion that a political system can—or should—be purged of self-interest is shortsighted, and reflects a deep misunderstanding about the basic forces that motivate political behavior. As historian Alan Brinkley has persuasively argued:

The belief that a pure “public interest” exists somewhere as a kernel of true knowledge untainted by politics or parochialism, and that it provides not just an array of basic principles but a concrete set of solutions to complex problems, is an attractive thought. But it is also a myth. We may be able to agree on a broad framework of beliefs capable of organizing our political life, but any such framework will have to make room within it for conflicting conceptions of how to translate those beliefs into practice.²⁰⁸

Not even the Framers succeeded in elevating the “general good” over localized, sectional, or other self-interested concerns. From the first days of the new Congress, fights over tariffs, assumption, industrialization, agriculture, and even slavery were dominated by members seeking to advance their constituents’ interests.²⁰⁹

204. *Id.* at 173.

205. *Id.* at 37.

206. *Id.* at 34.

207. THE FEDERALIST NO. 51, at 262 (James Madison) (Bantam Classic ed., 1982).

208. Alan Brinkley, *The Challenge to Deliberative Democracy*, in THE NEW FEDERALIST PAPERS 23, 26 (Alan Brinkley et al. eds., 1997).

209. KENNETH R. MAYER & DAVID T. CANNON, THE DYSFUNCTIONAL CONGRESS 46–50

Of course, there is nothing wrong with encouraging citizens and voters to take the broader view. The difficulty that Ackerman and Ayres face, though, is that their solution seeks to impress that view through coercive prescription and proscription. They may believe that they are creating only modest impositions, but they are wrong. In the interest of promoting equality, they pile one government coercion upon another: limits on speech and association, government secrecy backed up with criminal penalties, heightened investigations of contacts between interest groups and public officials, and elimination of information cues about candidates and interest groups.

Ultimately their framework is built on the flawed assumption that very nearly denies the possibility of sincere policy preferences or the validity of expressing philosophical support or opposition through a campaign donation. In return for significant restrictions on individual rights, we stand to purchase an ineffective regime. This is not a deal worth making.